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Senate

The Senate met at 9:31 a.m. and was called to order by the Honorable SAM BROWNBACK, a Senator from the State of Kansas.

PRAYER

The Chaplain, Dr. Barry C. Black, offered the following prayer:

Let us pray.

Sovereign God, fountain of light, Your Senators still face deep valleys and challenging mountains. Please don't remove their mountains, but give them the strength to climb them. May they discover that the power required for life's low and high places will come from You. Remind them to greet those two imposters—success and failure—with the same equanimity and faith. Help them to see that the race is not to the swift and the battle not to the strong, but true victory comes only from You. Take from them distracting worries, and give them more trust.

Lord, empower each of us today to keep our hearts pure, to keep our minds clean, to keep our words true, and to keep our deeds kind.

We pray in Your holy Name. Amen.

PLEDGE OF ALLEGIANCE

The Honorable SAM BROWNBACK led the Pledge of Allegiance, as follows:

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all.

APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

The PRESIDING OFFICER. The clerk will please read a communication to the Senate from the President pro tempore (Mr. STEVENS).

The bill clerk read the following letter:

U.S. SENATE,
PRESIDENT PRO TEMPORE,
Washington, DC, May 25, 2005.

To the Senate:

Under the provisions of rule I, paragraph 3, of the Standing Rules of the Senate, I hereby

appoint the Honorable SAM BROWNBACK, a Senator from the State of Kansas, to perform the duties of the Chair.

TED STEVENS,
President pro tempore.

Mr. BROWNBACK thereupon assumed the Chair as Acting President pro tempore.

RESERVATION OF LEADER TIME

The ACTING PRESIDENT pro tempore. Under the previous order, the leadership time is reserved.

RECOGNITION OF THE MAJORITY LEADER

The ACTING PRESIDENT pro tempore. The majority leader is recognized.

SCHEDULE

Mr. FRIST. Mr. President, today, following the leader time, we will begin a 1-hour period of morning business. After morning business, we will resume postcloture debate on the nomination of Priscilla Owen to be a U.S. circuit judge for the Fifth Circuit. Yesterday, the Senate invoked cloture by a vote of 81 to 18. Today at noon, we will vote up or down on the Owen nomination. Following that vote, it is my intention to proceed to the Bolton nomination. There has been a request for a large amount of time, so we would like to begin those statements right away. We will finish the Bolton nomination before the end of the week, and I thank my colleagues in advance for their participation in that important debate and the opportunity to complete that nomination confirmation this week.

JUDICIAL FILIBUSTERS

Mr. FRIST. Mr. President, the confirmation over judicial filibusters is, I believe, the greatest single constitutional issue to confront the Senate in

our lifetime. That is because this issue involves the very special and unique relationship between the Senate and the Presidency and the special relationship between the Senate and the courts. It involves all three branches of government. In addition, it involves the interaction between the minority and majority parties within the Senate.

The Senate confronts so many significant issues every month, every year, but none of them touches the grand institutions of American democracy the way this one does. The President has the constitutional obligation to appoint judges, and the Senate has the constitutional responsibility to offer its advice and consent.

For 214 years, the Senate gave every nominee brought to the floor a fair up-or-down vote. Most we accepted; some we rejected. But all of those nominees got a vote.

In the last Congress, however, the minority leadership embarked on a new and dangerous course. They routinely filibustered 10 of President Bush's appellate court nominees and threatened filibusters on 6 more. Organized and fueled by the minority leadership, these filibusters could not be broken. By filibuster, the minority denied the nominees a confirmation vote and barred the full Senate from exercising its obligation to advise and consent.

The purpose of those filibusters was clear. It was not only to keep the President's nominees off the bench; it was to wrest control of the appointments process from the President. Anyone who did not pass the minority leadership's ideological litmus test would be filibustered. That meant a minority would dictate whom the President should appoint, if he expected that nominee to get a confirmation vote in this body. That was a power grab of unprecedented proportions.

With more filibusters threatened for this Congress, the power grab would become even bolder. It would become even more entrenched. Fundamental

● This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.



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constitutional principles were called into question. They included the separation of powers, checks and balances, the independence of the judiciary, and the negation of the Senate's right to advise and consent. The minority claimed the right to impose a 60-vote threshold before a nominee could pass muster, for that is the number needed to invoke cloture and to break a filibuster. The Constitution doesn't say that. It only requires a majority to confirm. But for a minority spinning novel constitutional theories, the real Constitution took a back seat.

The Republican majority tried first to invoke cloture on each of the judicial nominees, but driven by the minority leadership, the filibusters proved resilient to cloture. Then we introduced a filibuster reform proposal and, with regular order, took it through the Rules Committee, but it died without action because it was sure to be filibustered as well.

So then we turned to the voters in November. The election strengthened our majority. But the minority ignored the election and even dug their heels in further. Faced with the certainty that the minority would expand its filibusters, we faced a critical choice: either accept the filibuster power grab as the new standard for the Senate or restore the tradition of fair up-or-down votes on nominees.

We, as Republican leadership, decided to stand for a principle. That principle is simple and clear. It is clear without equivocation, without trimming. Every judicial nominee brought to the floor shall get a fair up-or-down vote—a simple principle.

The Constitution specifically gives the Senate the power to govern itself. We were fully committed to use that power to establish a process by which a confirmation vote would occur after reasonable debate. This approach has a lot of precedent. We were prepared to use this approach. The minority attempted to demean it by calling it the nuclear option, surrounding it with threats of closure of government and stopping this body from working. But realistically, the nuclear option is what they did. It is what they did when they detonated this filibuster power grab in the last Congress.

The proper term for our response is the "constitutional option" because we would rely on the Constitution's power of self-governance to restore Senate traditions barring judicial filibusters. Against their unprecedented power grab by filibuster—that is what I would call the nuclear option—there is only one antidote that is certain, that would absolutely be effective, and that is the constitutional option.

The moment of truth was to have come yesterday on May 24, but, as we all know, that action was preempted by an agreement among seven Democrats and seven Republicans to forestall use of the constitutional option in exchange for confirmation votes on just three nominees and a promise that fili-

busters would occur only under what are called in the agreement "extraordinary circumstances." I was not a party to that agreement, nor was our Republican leadership. It stops far short of guaranteeing up-or-down votes on all nominees. It stops far short of the principle on which this leadership stands. It leaves open the question of whether someone such as Miguel Estrada, who came to this country as a 17-year-old immigrant from Honduras, worked his way to the top of college and law school, and tried 15 cases at the Supreme Court, who was filibustered again and again and again, filibustered 7 times, would be an extraordinary circumstance.

Now we move on to a new and an uncertain phase. Today, the Senate will happily confirm Priscilla Owen to the Fifth Circuit Court of Appeals. Some of the other nominees will follow her. Priscilla Owen is a gentlewoman, an accomplished lawyer, and a brilliant Texas jurist. She was unconscionably denied an up-or-down vote for not just a few months or a year or 2 years but for 4 years. It was over 4 years ago that she was nominated to this position. The minority has distorted her record. They have cast aspersions on her abilities. They have rendered her almost unrecognizable. She had the fortitude to see the process through. Very late, too late, but finally, she will receive an up-or-down vote and will be confirmed.

Without the constitutional option, Priscilla Owen would have never come to a vote today. Neither would any of the other nominees. The other side made it clear that they would filibuster. Without the constitutional option, judicial filibusters would have become a standard instrument of minority party policy.

The agreement among those 14 is based on trust, a trust that casual use of judicial filibusters is over. Without the constitutional option, the minority would have adhered to the path it was on, and deal brokers would have had no deal to broker.

I am very hopeful now and optimistic, but I am curious what "extraordinary circumstances" will mean.

I am wary, but as Ronald Reagan was fond to say, "Trust but verify." If nominees receive up or down votes and the sword of the filibuster is sheathed, then the Republican leadership can be proud that its focused direction on the constitutional option arrested a dangerous and destructive trend.

If filibusters erupt under circumstances other than extraordinary, we will put the constitutional option back on the table and will implement it. Abraham Lincoln once said that when it is not possible to do the best, it is best to do what is possible. Standing firm for the principle of fair up-or-down votes, we have made real progress. That is something I think we can all celebrate with the up-or-down vote Priscilla Owen receives today. That principle will be our guidepost as the rest of this great constitutional drama unfolds.

I yield the floor.

RECOGNITION OF THE MINORITY LEADER

The ACTING PRESIDENT pro tempore. The Democratic leader is recognized.

MOVING FORWARD

Mr. REID. Mr. President, I am sorry I was unable to be on the floor for the entire statement of the Republican leader. I think we should just move on. Filibusters are only under extraordinary circumstances. That is when you filibuster. I have been involved in two filibusters during my career of almost 19 years in the Senate. That is two more than most people have been involved in. Filibusters don't happen very often. I think we should move beyond this and get the business of the country done. Let's not talk about the nuclear option any more. Let the Senate work its will. Let's get over this. I have said it is good that it is over with, done.

I wish the distinguished majority leader and I could have worked something out on our own. We didn't. It was done by 14 people, 7 Democrats and 7 Republicans. We have important things to do. There is no question that these five people—actually that is what it boiled down to—are important, but keep in mind they all had jobs. They were all working. It is not as if they were in a bread line someplace. It is unfortunate that during the last 12 years there have been problems with these judges, and I would say problems we never had before.

During the Clinton years, we had more than 60 nominees that never even got a hearing. We talked yesterday about what happened in the Bush years. Let's put that behind us and move on. Let's forget about it and have the Senate work its will. If a problem comes up with a judge, there will be discussions between the Senator from Tennessee and me. If it is necessary, there will be extended debate, and we will talk about it. That is not going to happen very often. We know that. So let's just go about our business. I had a wonderful conversation with the Attorney General of the United States yesterday. He acknowledged, let's move on. I said, fine, let's move on. Let's just move on and not talk about this any more.

I have had extended conversations with the distinguished Republican leader, and the next matter that the Senate is going to be involved in is the Bolton nomination. We are clear on the Democratic side to move forward. I think it would be in the best interest of everybody if we get this agreement made as quickly as possible and we can move forward. That is why I hope my friend from Montana—if somebody comes to the floor and we can clear this in the next little bit, that should be done. I don't want us being blamed